

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

APPEALS COURT NO. 2018-P-0166

COMMONWEALTH

v.

HUGO BACCARIN

BRIEF FOR THE DEFENDANT ON APPEAL
FROM THE BARNSTABLE DISTRICT COURT

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FEBRUARY 2018

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STATEMENT OF THE ISSUE

1. Did The Prosecutor's Recitation Of Facts Suffice To Support Charges Of Assault And Battery On A Household Member And Vandalism?

STATEMENT OF THE CASE

The defendant, Hugo Baccarin, was charged with (1) assault and battery on a household member and (2) vandalism out of Barnstable District Court on November 21, 2016.¹ (R. 3). The defendant pleaded guilty to the first charge and admitted to sufficient facts on the second charge. (R. 5). The Court found the defendant guilty on the first charge and continued the second charge without a finding. (R. 5). The Court sentenced the defendant to a year of probation on both charges. (R. 5).

Facing deportation, the defendant filed a motion to withdraw his plea in October 2017. (R. 8). The defendant argued that he was entitled to withdraw his plea because the prosecutor recited an insufficient factual basis for the charges. (R. 9-13). A hearing was held on the matter. (R. 8). The motion judge, who was also the plea judge, denied the motion in a margin

¹ The defendant's record appendix will be cited by page number as (R. _).

decision. (R. 8). The defendant filed a timely notice of appeal. (R. 7).

STATEMENT OF FACTS

The prosecutor recited the following facts at the defendant's plea hearing:

With respect to the assault and battery on a family/household member case, that was an incident from December 19, 2016, where the defendant was in a verbal argument with his girlfriend. According to the police report, there came a point in time when he punched her in the stomach. He then pushed her towards the door and punched her in the back. The police report indicates that as the defendant is outside the residence, he then broke the doorframe by smashing it, causing some financial damage to the door.²

(Tr. 5).

The defendant admitted to these facts and the judge accepted the defendant's plea. (Tr. 13). As noted above, the judge sentenced the defendant to a year of probation. (Tr. 13-14).

The defendant filed a motion to withdraw his plea in October 2017. (R. 8). He argued that there was an insufficient factual basis for the charge of assault and battery on a household member because the facts recited by the prosecutor failed to establish that the defendant and the victim were in a "substantive dating

² The transcript of the plea hearing will be cited by page number as (Tr. _).

or engagement relationship” as required by G. L. c. 265, s. 13M. (R. 10-13). The defendant further argued that there was an insufficient factual basis for the vandalism charge because the facts recited by the prosecutor failed to show that the damaged doorframe belonged to someone other than the defendant. (R. 13).

The judge denied the defendant’s motion in a margin decision. (R. 8). In her decision, the judge simply stated that the “information obtained by the Court in the course of the plea hearing was sufficient to support the charges to which the defendant plead.” (R. 8). The judge cited *Commonwealth v. Armstrong*, 88 Mass. App. Ct. 756, 758 (2015), and *Commonwealth v. Jenner*, 24 Mass. App. Ct. 763, 775 (1987), in support of her decision. (R. 8).

ARGUMENT

I. THE PROSECUTOR’S RECITATION OF FACTS FAILED TO ESTABLISH NECESSARY ELEMENTS OF BOTH ASSAULT AND BATTERY ON A HOUSEHOLD MEMBER AND VANDALISM.

The defendant’s motion to withdraw his plea should have been allowed because the Commonwealth failed to establish a sufficient factual basis for either charge. The prosecutor’s recitation of facts failed to establish that the victim was a “household member” of the defendant’s so as to support a charge

of assault and battery on a household member. The prosecutor's recitation of facts also failed to establish that the damaged door was someone else's property.

A. The Prosecutor Was Required To Recite Sufficient Facts To Establish Each Element Of The Charged Crimes.

In *Commonwealth v. Hart*, 467 Mass. 322 (2014), the SJC held that "[a] judge may not accept a guilty plea 'unless there are sufficient facts on the record to establish each element of the offense.'" *Id.* at 325, quoting *Commonwealth v. Delverde*, 398 Mass. 288, 297 (1986). The Court accordingly vacated a defendant's conviction for resisting arrest because the prosecutor's recitation of the facts at the plea colloquy did not establish an element of the offense. *Id.* at 326-327.

Applying the principle of *Hart* to the instant case, the question is whether the facts recited by the prosecutor established each element of (1) assault and battery on a household member and (2) vandalism. The elements of assault and battery on a household member are identical to simple assault and battery except the Commonwealth must also show that the victim is "a family or household member" of the defendant. G. L. c.

265, s. 13M. Family or household members are statutorily defined as “persons who (i) are or were married to one another, (ii) have a child in common regardless of whether they have ever married or lived together or (iii) are or have been in a substantive dating or engagement relationship.” *Id.* The elements of vandalism require an intentional defacing of someone else’s property. G. L. c. 266, s. 126A.

B. The Prosecutor’s Recitation Of Facts Failed To Establish That The Defendant And The Victim Were In A Substantive Dating Or Engagement Relationship.

The facts recited by the prosecutor failed to establish that the defendant and the victim were in “a substantive dating or engagement relationship” as required by G. L. c. 265, s. 13M. The statute commands courts to consider the following factors in determining whether such a relationship has been established: “the length of time of the relationship; the type of relationship; the frequency of interaction between the parties; whether the relationship was terminated by either person; and the length of time elapsed since the termination of the relationship.” *Id.* The facts recited by the prosecutor failed to touch on any of these factors. The prosecutor simply

referred to the victim as the defendant's girlfriend. This bare reference was insufficient to establish the existence of a "substantive dating or engagement relationship" as is required by the statute. *Id.* The victim may have been the defendant's longtime girlfriend or she may have been his girlfriend for all of a few days. It is impossible to conclude one way or the other based on the sparse facts recited by the prosecutor. If the prosecutor had provided some specific facts about the relationship, it would have been possible to determine whether the defendant and the victim were in a substantive dating relationship so as to satisfy the statute. See *Commonwealth v. Dustin*, 476 Mass. 1003, 1005 (2016) (evidence sufficient to establish "substantive dating relationship" where defendant and victim had been dating for months, relationship was exclusive, defendant took care of victim while she suffered from a medical condition, and they participated in daily activities together).

In fact, the inadequacy at issue in *Hart* is very similar to the inadequacy at issue in the instant case. *Hart* involved the crime of resisting arrest. 467 Mass. at 322. The prosecutor's recitation of facts

failed to provide a factual basis for the charge because the prosecutor simply stated that the defendant "resisted" arrest without any specific description of the resistive acts. *Id.* at 327-328. The same lack of specifics plagues the recitation at issue here. The prosecutor simply referred to the victim as the defendant's girlfriend without any specifics about the nature of their relationship. If a statement that the defendant "resisted" is insufficient to establish the resistance required for a resisting arrest charge, then a reference to the victim as the defendant's "girlfriend" is insufficient to establish the substantive dating relationship required for an assault and battery on a household member charge.

C. The Recited Facts Failed To Establish That The Damaged Property Was Owned By Someone Other Than The Defendant.

The analysis is simpler with respect to the vandalism charge. The vandalism statute, G. L. c. 266, s. 126A, criminalizes vandalism directed "at personal property of another." The prosecutor's recitation of facts failed to establish this charge because there was no allegation that the vandalized door belonged to someone other than the defendant. The facts said nothing about who owned or leased the residence. Thus,

there was an insufficient factual basis for this charge as well.

D. Commonwealth v. Armstrong Is Distinguishable Because The Recitation At Issue Here Failed To Establish A Strong Factual Basis For The Charges.

The judge's reliance on *Commonwealth v. Armstrong*, 88 Mass. App. Ct. 756 (2015), is misplaced. In *Armstrong*, the Court recognized that sufficient facts exist even if these facts fall short of establishing the defendant's guilt beyond a reasonable doubt. *Id.* at 758. However, the Court nevertheless recognized that the judge must hear facts that provide a "strong factual basis" for the charge. *Id.* To establish this factual basis, the Commonwealth must put "sufficient facts on the record to establish each element of the offense." *Id.* at 758, quoting *Hart*, 467 Mass. at 325.

The recited facts failed to establish a required element with respect to both charges. The existence of a "substantive dating or engagement relationship" between the defendant and the victim is required to establish the offense of assault and battery on a household member. The vandalized property must be "personal property of another" to establish a

vandalism charge. As noted above, there was not a strong factual basis to establish either one of these elements.

CONCLUSION

For the above-stated reasons, the defendant requests that the Court reverse the denial of his motion to withdraw his plea.

Respectfully Submitted,
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By his attorney,

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STATUTORY ADDENDUMG. L. c. 265, s. 13M

Section 13M. (a) Whoever commits an assault or assault and battery on a family or household member shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than \$5,000, or both such fine and imprisonment.

(b) Whoever is convicted of a second or subsequent offense of assault or assault and battery on a family or household member shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by imprisonment in the state prison for not more than 5 years.

(c) For the purposes of this section, "family or household member" shall mean persons who (i) are or were married to one another, (ii) have a child in common regardless of whether they have ever married or lived together or (iii) are or have been in a substantive dating or engagement relationship; provided, that the trier of fact shall determine whether a relationship is substantive by considering the following factors: the length of time of the relationship; the type of relationship; the frequency of interaction between the parties; whether the relationship was terminated by either person; and the length of time elapsed since the termination of the relationship.

(d) For any violation of this section, or as a condition of a continuance without a finding, the court shall order the defendant to complete a certified batterer's intervention program unless, upon good cause shown, the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention.

G. L. c. 266, s. 126A

Section 126A. Whoever intentionally, willfully and maliciously or wantonly, paints, marks, scratches, etches or otherwise marks, injures, mars, defaces or destroys the real or personal property of another including but not limited to a wall, fence, building, sign, rock, monument, gravestone or tablet, shall be punished by imprisonment in a state prison for a term of not more than three years or

by imprisonment in a house of correction for not more than two years or by a fine of not more than fifteen hundred dollars or not more than three times the value of the property so marked, injured, marred, defaced or destroyed, whichever is greater, or both imprisonment and fine, and shall also be required to pay for the removal or obliteration of such painting, marking, scratching or etching, or to remove or obliterate such painting, marking, scratching or etching; provided, however, that when a fine is levied pursuant to the value of the property marked, injured, marred, defaced or destroyed or when the cost of removal or obliteration is assessed, the court shall, after conviction, conduct an evidentiary hearing to ascertain the value of the property so marked, injured, marred, defaced or destroyed or to ascertain the cost of the removal or obliteration; and provided, however, that if the property marked, injured, marred, defaced or destroyed is a war or veterans' memorial, monument or gravestone, the fine under this section shall be doubled and the person convicted shall be ordered to perform not less than 500 hours of court-approved community service. A police officer may arrest any person for commission of the offenses prohibited by this section without a warrant if said police officer has probable cause to believe that said person has committed the offenses prohibited by this section.

CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that I have served a copy of the defendant's brief and record appendix to Assistant District Attorney Elizabeth Anne Sweeney, Barnstable County District Attorney's Office, 3231 Main Street, P.O. Box 455, Barnstable, MA 02630. I have made service via email.

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CERTIFICATE OF COMPLIANCE

I, Edward Crane, hereby certify, pursuant to Massachusetts Rule of Appellate Procedure 16(k), that this brief complies with all applicable rules of court pertaining to the filing of briefs.

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